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Trade Union Rights in the Workers' State: Poland and the ILO

DAVID A. WIRTH*

I. INTRODUCTION**

Poland recently gave notice of its intent to withdraw from the International Labor Organization ("ILO") as a result of the ILO's treatment of the Polish trade union situation.¹ The Polish government had previously warned of this action by characterizing the ILO's establishment of a Commission of Inquiry to investigate alleged violations of trade union rights in Poland as "[i]nterference in Poland's internal affairs" and "an artificial, politically motivated resolve to keep by every means the so-called Polish case on ILO's agenda."² One implication of this statement is that the Organization has attempted to hold Poland—a state in which "[t]he working people . . . wield state authority"³—to standards inconsistent with the theoretical equivalence of the workers' and the state's interests. Although the Commission's report⁴ rejected these arguments, Poland's assertions continue to have significance for the overall work of the ILO. A particularly important question in this context is whether the existence of trade unions free of state and Communist Party⁵ influence is consistent

* Office of the Legal Adviser, United States Department of State. The views presented in this article are those of the author and do not represent positions of the Department of State. The author would like to acknowledge Professor Leon S. Lipson, who suggested the subject of this article.

** Due to publication delays, the editors regret that diacritical marks have been deleted from the text and footnotes. Complete copies of various sources are available by contacting the *Journal* office.

1. Letter from Ambassador Stanislaw Turbanski, Permanent Representative of the Polish People's Republic to the United Nations Office in Geneva, to Francis Blanchard, Director-General of the ILO (Nov. 17, 1984). The withdrawal will not take effect for two years and does not alter the obligations undertaken by Poland pursuant to ILO conventions. ILO CONST. art. 1, para. 5. The Belorussian SSR, Bulgaria, Czechoslovakia, Hungary, the German Democratic Republic, Mongolia, the Ukrainian SSR, and the USSR have formally supported Poland's action. Letter to Francis Blanchard, Director-General of the ILO (Nov. 23, 1984).

2. Letter from Stanislaw Turbanski, Permanent Representative of the Polish People's Republic in Geneva, to Francis Blanchard, Director-General of the ILO (June 24, 1983), reprinted in 67 Off. Bull., Ser. B, Spec. Supp. Annex I (1984) (Commission of Inquiry report on Poland).

3. KONSTYTUCJA (Constitution) art. 2, para. 1 (Pol.). Cf. KONSTITUTSIJA (Constitution) art. 1 (USSR) (The state "express[es] the will and interests of the workers.")

4. 67 Off. Bull., Ser. B, Spec. Supp. (1984) (Commission of Inquiry report on Poland). See *infra* text accompanying notes 66 & 68.

5. The Communist Party does not have a formal role in the government or the state, but is "the guiding political force of society in building socialism." KONSTYTUCJA (Constitution) art. 3, para. 1 (Pol.). Cf. KONSTITUTSIJA (Constitution) art. 6 (USSR) (The Communist

with the fundamental political principles on which a workers' state such as Poland is based.⁶

II. TRADE UNION THEORY AND PRACTICE IN POLAND

Lenin's statements about the role of trade unions in the postrevolutionary workers' state were ambiguous. Lenin rejected the proposition that the state should assert total control over the unions as well as the thesis that the unions should be completely autonomous. Instead he adopted a compromise view that identified the unions primarily as links between the state and the masses. The unions were not to be instruments of the state, although their goals would be consistent with those of the state and the Party. Likewise the unions would act as a vehicle for resolving workers' grievances, although they would also participate in supervising production norms and enforcing labor discipline.⁷

In practice the behavior of the official trade unions in Poland and other Soviet bloc states has been remote from this intermediate doctrinal position. The tension inherent in the unions' dual role is usually resolved in favor of the concerns of the state and the Party. The unions' function of transmitting directives to workers from the state and the Party has

Party is "[t]he leading and guiding force of Soviet society.") Conceptual distinctions between the Party and the state, however, are often unproductive, as the Party's influence permeates virtually all governmental organs. See, e.g., W. BRUS, *SOCIALIST OWNERSHIP AND POLITICAL SYSTEMS* 51-57 (1975) (etatist model of Party). See also de Weydenthal, *Workers and Party in Poland*, *PROBS. COMMUNISM*, Nov.-Dec. 1980, at 1, 16 ("[T]he Polish sociopolitical environment has long been characterized by the party's dominance over all aspects of organized social activity, especially by the official insistence that no form of public activity can develop independently of the party's direct control and supervision.")

6. For a discussion of events leading to the establishment of independent trade unions in Poland, see generally N. ASCHERSON, *THE POLISH AUGUST* (1982); R. ERINGER, *STRIKE FOR FREEDOM!* (1982); D. MACSHANE, *SOLIDARITY* (1981); A. TOURAINE, F. DUBET, M. WIEVIORKA & J. STRZELECKI, *SOLIDARITY* (1983) [hereinafter cited as TOURAINE, ET AL.]; L. WESCHLER, *SOLIDARITY* (1982).

7. See S. COHEN, *BUKHARIN AND THE BOLSHEVIK REVOLUTION* 102-03 (1974); M. FAINSOD, *HOW RUSSIA IS RULED* 143 (rev. ed. 1963). Lenin's view was founded primarily on Marx's conception of trade unions as "schools of communism." See S. COHEN, *supra*, at 102; F. KAPLAN, *BOLSHEVIK IDEOLOGY AND THE ETHICS OF SOVIET LABOR* 295 (1968); A. LOZOVSKY, *MARX AND THE TRADE UNIONS* 175 (1942). See generally Lenin, *The Trade Unions, the Present Situation and Trotsky's Mistakes*, in *ON TRADE UNIONS* 375, 376-77 (B. Koval ed. 1970) (speech delivered on December 30, 1920). Cf. KONSTYTUCJA (Constitution) art. 85 (Pol.) ("Trade unions . . . shall be the school of civic activeness and involvement in the building of socialist society.") Lenin had previously adhered to Trotsky's position requiring total "statification" of the unions, but underwent an ideological shift in 1920. See S. COHEN, *supra*, at 102; J. SORENSON, *THE LIFE AND DEATH OF SOVIET TRADE UNIONISM* 85-86 (1969). Lenin's ultimate position can be seen as a practical compromise intended to resolve the conflict between the unions and the state. See L. SCHAPIRO, *THE ORIGIN OF THE COMMUNIST AUTOCRACY* 283 (2d ed. 1977); J. SORENSON, *supra*, at 85-86. See also N. ASCHERSON, *supra* note 6, at 248 (Lenin's statements on trade unions were "responses to crises.") Although he viewed trade unions as focal points for the political organization of the working class in capitalist countries, Marx provided little guidance on the role of trade unions in the post-revolutionary state. See A. LOZOVSKY, *supra*, at 16-25, 174-75.

consequently expanded at the expense of activities directed toward the defense of workers' interests. As a result, the official Polish trade unions have supported wage reductions, longer working hours, and productivity increases.⁸ As a matter of principle, however, the bloc states have adopted a contradictory position by committing themselves, as discussed in the following section, to certain international standards established by the ILO.⁹

III. POLAND AND THE ILO

The ILO was founded for the improvement of conditions of labor,¹⁰ a

8. See N. ASCHERSON, *supra* note 6, at 249; A. KARATNYCKY, A. MOTYL & A. STURMTHAL, *WORKERS' RIGHTS, EAST AND WEST* 69-71 (1980) [hereinafter cited as KARATNYCKY, ET AL.]; Stefanowsky & Hudson, *Two Conflicting Concepts of Unions in Poland*, in AUGUST 1980: THE STRIKES IN POLAND 62 (W. Robinson ed. 1980) [hereinafter cited as AUGUST 1980]. See also J. DE WEYDENTHAL, *THE COMMUNISTS OF POLAND* 62 (1978); M. DZIEWANOWSKI, *THE COMMUNIST PARTY OF POLAND* 201 (2d ed. 1976); R. LESLIE, A. POLONSKY, J. CIECHANOWSKI & Z. PELCZYNSKI, *THE HISTORY OF POLAND SINCE 1863*, at 301 (1980); P. WANDYCZ, *THE UNITED STATES AND POLAND* 344 (1980). Cf. M. FAINSOD, *supra* note 7, at 518-22 (trade union practice in USSR); KARATNYCKY, ET AL., *supra*, at 53-64, 78-93 (trade union practice in USSR, Rumania, and Czechoslovakia). Strikes are not prohibited by legislation in Poland and other bloc states, but are theoretically impossible because the state's and the workers' interests supposedly coincide. See C. JENKS, *THE INTERNATIONAL PROTECTION OF TRADE UNION FREEDOM* 368 (1957). Termination without notice, however, is authorized in Poland for "a serious violation of . . . basic obligations as a worker and, more particularly, . . . [for] absen[ce] from . . . work without a valid reason." LAB. CODE § 52(1)(1) (1974)(Pol.), translated in 1974 ILO LEGIS. SER. This provision has been used to punish striking workers. See KARATNYCKY, ET AL., *supra*, at 71-73. See also LAB. CODE §§ 64 & 65 (1974) (Pol.) (providing for cancellation of contract of employment for absence from workplace).

9. Various provisions of Polish domestic legislation in principle protect trade union rights. The Polish constitution provides that "[t]rade unions shall play an important part in the Polish People's Republic . . . [and] shall represent the interests and rights of the working people." KONSTYTUCJA (Constitution) art. 85 (Pol.). The constitution also provides that "trade unions . . . shall unite citizens for their active participation in political, social, economic, and cultural life." *Id.* art. 84, para. 2. See also *id.* art. 83, para. 1 & art. 84, para. 1 (guaranteeing freedom of meetings and assembly and right of association). Article 1, paragraph 1 of the Trade Union Act of 1982 states that "[w]orkers shall have the right to establish and associate together in trade unions." 1982 Dziennik Ustaw 581 (Pol.), translated in 1982 ILO LEGIS. SER. The Act also provides that "[t]rade unions represent occupational interests of their members." *Id.* art. 5. In addition, "[t]rade unions represent and defend the workers' rights and interests in connection with working conditions, wages, social and living conditions and welfare." *Id.* art. 6, para. 1. The Polish labor code specifies that "[w]orkers shall have the right to associate in trade unions." LAB. CODE § 19(1) (1974) (Pol.), translated in 1974 ILO LEGIS. SER. But see *id.* § 19(2) (Trade unions "shall . . . co-operate with the competent organs of government in issuing and applying the provisions of labour law and shall take action to reinforce the rule of law in connection with the observance of the workers' rights and obligations.")

10. See ILO CONST. preamble para. 2 & annex art. III. The ILO is now a specialized agency of the United Nations. See Protocol Concerning the Entry into Force of the Agreement Between the United Nations and the International Labour Organization, Dec. 19, 1946, 1 U.N.T.S. 183, 29 Off. Bull. 383 (1946). All UN members are eligible to become ILO members. ILO CONST. art. 1, para. 3. This accounts for the presence in the ILO of the Belorussian and Ukrainian SSRs, both of which are UN members. See *supra* note 1 & *infra*

mandate which is furthered through the adoption of conventions¹¹ and recommendations.¹² The annual International Labor Conference¹³ is the plenary body of the Organization and the Governing Body¹⁴ its executive council. The International Labor Office,¹⁵ headed by the Director-General, is the Organization's secretariat. The most distinctive feature of the ILO's institutional structure is the principle of tripartism, under which not only government officials, but also representatives of workers and employers, are participating delegates to the Conference and the Governing Body.¹⁶

notes 16, 21 & 22.

11. Only ratification by a member state creates binding obligations under a convention. ILO CONST. art. 20. *But see infra* text accompanying note 43 (freedom of association principles apply to member states regardless of ratification of Nos. 87 and 98).

12. Recommendations are guidelines for national action. *See* N. VALTICOS, INTERNATIONAL LABOUR LAW 44 (1979); Landy, *The Implementation Procedures of the International Labor Organization*, 20 SANTA CLARA L. REV. 633, 634 (1980).

13. *See* ILO CONST. arts. 3 & 4. *See generally* G. JOHNSTON, THE INTERNATIONAL LABOUR ORGANISATION 25-46 (1970); N. VALTICOS, *supra* note 12, at 34-36.

14. *See* ILO CONST. art. 7. *See generally* G. JOHNSTON, *supra* note 13, at 47-53; N. VALTICOS, *supra* note 12, at 36-37.

15. *See* ILO CONST. arts. 8-10. *See generally* G. JOHNSTON, *supra* note 13, at 54-63; N. VALTICOS, *supra* note 12, at 37-38.

16. At the Conference each member state is entitled to two government delegates and one delegate each representing workers and employers. ILO CONST. art. 3, para. 1. Each delegate to the Conference has one vote. *Id.* art. 4, para. 1. The Governing Body has the same 2:1:1 ratio of representation. *Id.* art. 7, para. 1. *See generally* W. GALENSON, THE INTERNATIONAL LABOUR ORGANIZATION 11 (1981) ("[I]t is not at all unusual, especially among democratic countries, for delegates from one nation to vote differently on various issues."); N. VALTICOS, *supra* note 12, at 29. When the Soviet Union first joined the ILO in 1934, a long conflict between the principles of tripartism and universal membership began. *See generally* A. ALCOCK, HISTORY OF THE INTERNATIONAL LABOUR ORGANIZATION 290-317 (1971); W. GALENSON, *supra*, at 35-47; G. JOHNSTON, *supra* note 13, at 16-17 (principle of universality). There were numerous objections to the participation of Soviet workers' and employers' delegates on the ground that they represented institutions and interests that were not distinct from those of the state. *See* A. ALCOCK, *supra*, at 131-33. *See generally* N. VALTICOS, *supra* note 12, at 32-34 (summarizing problems with credentials of nongovernmental delegates from bloc states). *Cf. infra* note 60 (criteria for selection of nongovernmental delegates). Dispute over the role of workers' and employers' delegates to the ILO from Soviet bloc states continues to the present. *See, e.g.*, Letter from Henry A. Kissinger, Secretary of State of the United States, to Francis Blanchard, Director-General of the ILO (Nov. 5, 1975), U.N. Doc. A/C.5/1704 Annex (1975), *reprinted in* 14 INT'L LEGAL MATERIALS 1582 (1975) (letter transmitting intent of United States to withdraw from ILO, citing erosion of tripartite representation). The bloc states for their part have complained of a capitalist bias in the ILO. At the time of the Organization's founding, the USSR denounced it as "a capitalist device to oppress working people." W. GALENSON, *supra*, at 4. *See also* A. ALCOCK, *supra*, at 128 (Soviet criticisms of ILO); V. SHKUNAEV, MEZHDUNARODNAIA ORGANIZATSIIA TRUDA VCHERA I SEGODNIA 7-17 (1968) (ILO founded by ruling classes as instrument of reform designed to subdue class struggle); V. VLADIMIROV, MEZHDUNARODNAIA ORGANIZATSIIA TRUDA 10-11 (1959) (same); Letter to Francis Blanchard, Director-General of the ILO (Mar. 29, 1985), ILO Doc. GB.230/19/4 Appendix I (declaration of Bulgaria, Belorussian SSR, Czechoslovakia, German Democratic Republic, Hungary, Mongolia, Ukrainian SSR, and USSR asserting that "the ILO in effect serves the interests of only one socio-political system, that of capitalism, in an attempt to impose its will and ways on other States"). The bloc has also

A. *The ILO Freedom of Association Conventions*

Conventions Nos. 87¹⁷ and 98¹⁸ ("freedom of association conventions") are among the principal human rights instruments of the ILO. No. 87, "the basic instrument for the international protection of freedom of association,"¹⁹ provides that workers and employers, without distinction, shall have the right to establish and join organizations of their own choosing without previous authorization. These organizations are to have the rights, free from interference by public authorities, to draw up constitutions and rules, to elect representatives freely, and to direct their activities. Workers' and employers' organizations are not to be dissolved by administrative authority. The acquisition of legal personality by workers' and employers' organizations is not to be made subject to conditions that would restrict these rights. Workers' and employers' organizations are to have the right to establish and join federations and confederations, which in turn may affiliate with international organizations of workers and employers.

No. 98 elaborates No. 87's guarantees with special concern for workers and workers' organizations. Workers are to enjoy adequate protection against acts of antiunion discrimination, which include conditions that a worker not join a union and dismissal by reason of union membership. Workers' organizations are protected from interference by employers and from acts designed to subject workers' organizations to the domination of employers. Procedures for guaranteeing these rights are to be established.²⁰

Each of the Soviet bloc states has ratified Nos. 87 and 98.²¹ Although the Soviet Union was not an active member of the ILO when Nos. 87 and

complained of socialist underrepresentation in the ILO. *See, e.g.,* V. SHKUNAIEV, *supra*, at 155-79 (bloc states' efforts to increase socialist representation in ILO organs); Letter to Francis Blanchard, *supra*. Among nongovernmental delegates from bloc states, only workers' delegates have ever been elected to the Governing Body. Even that has been an infrequent occurrence. *See* W. GALENSON, *supra*, at 96.

17. Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize, *adopted* July 9, 1948, 68 U.N.T.S. 17, 31 Rec. Proc. 547 (1948).

18. Convention (No. 98) Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, *adopted* July 1, 1949, 96 U.N.T.S. 257, 32 Rec. Proc. 850 (1949).

19. N. VALTICOS, *supra* note 12, at 81.

20. Neither convention mentions the right to strike. Fundamental principles of freedom of association, however, have been construed to protect the right to strike under many circumstances and to prohibit, in particular, an absolute prohibition on strikes. *See* N. VALTICOS, *supra* note 12, at 85-86. *See generally* INTERNATIONAL LABOUR OFFICE, FREEDOM OF ASSOCIATION 109-30 (2d ed. 1976) (digest of Committee on Freedom of Association decisions).

21. 253 U.N.T.S. 387, 394 (Belorussian SSR); 337 U.N.T.S. 392, 405 (Bulgaria); 131 U.N.T.S. 344, 134 U.N.T.S. 378 (Cuba); 488 U.N.T.S. 363, 365 (Czechoslovakia); 972 U.N.T.S. 425 (German Democratic Republic); 272 U.N.T.S. 254, 258 (Hungary); 682 U.N.T.S. 328, 332 (Mongolia); 264 U.N.T.S. 332, 348 (Poland); 272 U.N.T.S. 254, 318 U.N.T.S. 420 (Rumania); 253 U.N.T.S. 387, 394 (Ukrainian SSR); 249 U.N.T.S. 453, 459 (USSR).

98 were adopted,²² the USSR was a principal contributor to the initiative which led to the two conventions.²³ Both at the time the conventions were drafted²⁴ and later,²⁵ the Soviet Union objected that they were insufficient, in part because they did not guarantee the right to strike. The Polish government delegation abstained from voting for No. 87 because the text was inadequate to protect trade union rights.²⁶ A Czechoslovak government delegate²⁷ and Polish and Czechoslovak workers' delegates²⁸ even proposed an amendment to the draft of No. 98 that would have codified the right to strike.

B. *Supervision Under the Freedom of Association Conventions*

The ILO not only adopts conventions, but also employs measures to encourage and monitor implementation of ratified conventions by member states. There are two paths by which the ILO may facilitate adherence to the principles contained in Nos. 87 and 98: so-called "ordinary supervision," applicable to any ratified convention; and specialized adjudicatory procedures applicable only to the freedom of association conventions. Results of proceedings commenced through both routes demonstrate that Poland has persistently failed to uphold the trade union rights it voluntarily undertook to protect.

1. *Ordinary Supervision*

Ordinary reporting and supervisory procedures come into effect upon ratification of a convention. Member states must prepare reports on progress in the implementation of ratified conventions.²⁹ These reports are

22. When the USSR was expelled from the League of Nations in 1939, its status in the ILO became unclear. See A. ALCOCK, *supra* note 16, at 157-58; V. SHKUNAEV, *supra* note 16, at 135-36. The USSR, along with the Belorussian and Ukrainian SSRs, formally rejoined in 1954. 200 U.N.T.S. 338. Poland has been an ILO member continuously since the Organization's founding.

23. See, e.g., V. VLADIMIROV, *supra* note 16, at 62-63. See generally A. ALCOCK, *supra* note 16, at 252-54 (Soviet initiative on trade union rights, undertaken through World Federation of Trade Unions, diverted from UN to ILO by American Federation of Labor); S. IVANOV, MEZH DUNARODNAIA ORGANIZATSIIA TRUDA I PROFSOIUZNYE PRAVA V KAPITALISTICHESKIKH STRANAKH 16-27 (1959) (same).

24. See U.N. Doc. E/AC.7/SR.111, at 14 (1949) (Soviet criticisms of Nos. 87 and 98). See generally A. ALCOCK, *supra* note 16, at 254-60 (drafting history of Nos. 87 and 98); S. IVANOV, *supra* note 23, at 27-49 (same).

25. See S. IVANOV, *supra* note 23, at 45, 184-85, 191-92 (criticizing both conventions for failure to address right to strike, No. 87 for not prohibiting dissolution of trade unions by judicial authority, and No. 98 for excluding civil servants); V. SHKUNAEV, *supra* note 16, at 91-93 (objecting to the inclusion of protections for employers in both conventions and criticizing No. 87 for failure to treat dissolution by legislative or judicial authority and No. 98 for excluding civil servants and not addressing right to strike); V. VLADIMIROV, *supra* note 16, at 63-64 (objecting to the inclusion of protections for employers in both conventions and suggesting that No. 98 might even be used to justify actions against striking workers).

26. 31 Rec. Proc. 233 (1948).

27. 32 Rec. Proc. 470 (1949).

28. 32 Rec. Proc. 468 (1949).

29. ILO CONST. art. 22. Article 22 specifies annual reports. There are, however, over

transmitted to the Committee of Experts on the Application of Conventions and Recommendations ("COE"),³⁰ whose members are appointed in their individual capacities by the Governing Body on the recommendation of the Director-General. The COE bases its report on information supplied by governments and on other evidence, including comments from workers' and employers' organizations. The COE's report goes to the tripartite Conference Committee on the Application of Conventions and Recommendations ("CACR").³¹ The CACR produces its own report, which includes special mention of particular cases, for discussion in the plenary.

The COE has noted Poland's failure to implement the freedom of association conventions in the vast majority of its annual reports since Nos. 87 and 98 entered into force for that state.³² In its first report on Poland in 1959, the COE made observations about the trade union situation that became typical of its later comments. The Committee noted that the Trade Union Act of 1949³³ required registration with a Central Council of Trade Unions, which had the power to impose conditions on the grant of legal personality to an applicant organization. The COE

5000 ratifications of ILO conventions. See ILO Press Release (Aug. 11, 1982). Because of the workload, detailed reports are now required only every two years in the case of the freedom of association conventions. See W. GALENSON, *supra* note 16, at 203; Landy, *supra* note 12, at 638.

30. See generally E. LANDY, *THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION* 19-34 (1966); N. VALTICOS, *supra* note 12, at 240-42; Landy, *supra* note 12, at 643-45. The COE has enjoyed a reputation for impartiality and independence for many years, partly because members are appointed in their individual capacities. See W. GALENSON, *supra* note 16, at 203-04; Landy, *supra* note 12, at 641-42. But see *infra* note 32 (bloc states question COE's objectivity). The COE's report includes "observations" in the most important cases of nonimplementation. The COE also communicates "direct requests" to governments in anticipation of its next report. See N. VALTICOS, *supra* note 12, at 241; Landy, *supra* note 12, at 643.

31. See STAND. ORD. INT'L LAB. CONF. art. 7. See generally W. GALENSON, *supra* note 16, at 205-06; E. HAAS, *BEYOND THE NATION-STATE* 252-58 (1964); E. LANDY, *supra* note 30, at 36-51; N. VALTICOS, *supra* note 12, at 242; Landy, *supra* note 12, at 643-45.

32. 1985 COE Rep. 182-84, 236 (Nos. 87 & 98); 1983 COE Rep. 147-48, 181 (Nos. 87 & 98); 1982 COE Rep. 125-26 (No. 87); 1981 COE Rep. 121 (No. 87); 1979 COE Rep. 140-41 (No. 87); 1977 COE Rep. 161 (No. 87); 1975 COE Rep. 113-14 (No. 87); 1973 COE Rep. 127-28 (No. 87); 1972 COE Rep. 161, 187 (Nos. 87 & 98); 1971 COE Rep. 129, 146 (Nos. 87 & 98); 1970 COE Rep. 121 (No. 87); 1969 COE Rep. 92, 105 (Nos. 87 & 98); 1968 COE Rep. 94 (No. 87); 1967 COE Rep. 90, 102 (Nos. 87 & 98); 1966 COE Rep. 101 (No. 87); 1965 COE Rep. 98, 109 (Nos. 87 & 98); 1964 COE Rep. 131, 149 (Nos. 87 & 98); 1963 COE Rep. 99-100, 112 (Nos. 87 & 98); 1962 COE Rep. 96-99, 128 (Nos. 87 & 98); 1961 COE Rep. 75-77 (No. 87); 1960 COE Rep. 44-46 (No. 87); 1959 COE Rep. 49 (No. 87). See *infra* note 47 (Nos. 87 and 98 entered into force for Poland in 1958). Poland and the other bloc states have questioned the validity of the approach taken by the COE in evaluating their implementation of the freedom of association conventions. See, e.g., 1977 COE Rep. 134-35 (dissenting remarks of Polish and Soviet COE members); 1963 COE Rep. 85 (COE response to criticisms from Polish and Soviet COE members). See generally 71 Rec. Proc. 38/7 (1985) (Soviet government adviser's questioning of status of COE under ILO Constitution); E. LANDY, *supra* note 30, at 193-96.

33. 1949 Dziennik Ustaw 853 (Pol.), translated in 1949 ILO LEGIS. SER.

characterized these provisions as a legislative mandate for a monopolistic trade union movement. The Committee then observed that this statutory scheme was inconsistent with No. 87's provisions guaranteeing workers the right to establish and join organizations of their own choosing without previous authorization and assuring workers' organizations the right to direct their own activities. In its next report, the Committee more forcefully characterized the Central Council's requirements for registration as government regulations and concluded that the legislative framework as a whole constituted impermissible interference by the state in protected trade union activity.³⁴ The CACR has also publicized Poland's violations of trade union rights. The CACR included Poland in a "special paragraph" in its 1982 report to draw attention to the inconsistencies between No. 87 and the declaration of martial law in December 1981.³⁵

The ILO's Constitution provides another procedure for evaluation of the adequacy of implementation of obligations assumed pursuant to a convention. Under article 26 a member state may file a complaint against another member alleging nonobservance of a convention both have ratified. The Governing Body may also initiate a complaint on its own motion or upon the request of a delegate to the Conference. The Constitution provides for subsequent consideration of complaints in appropriate cases by a Commission of Inquiry established by the Governing Body.³⁶

Until 1983 only five full-scale Commissions of Inquiry had been established in the ILO's history.³⁷ The Governing Body constituted the sixth as a result of an article 26 proceeding initiated against Poland under Nos. 87 and 98 by the French and Norwegian workers' delegates to the 1982 Conference.³⁸ The Polish government became the first in the history

34. Cf. S. IVANOV, *supra* note 23, at 100-06 (distinguishing requirements for registration with governmental authorities from requirements for registration with trade union organs).

35. 68 Rec. Proc. 31/11 (1982) (noting that "the general suspension of trade union activities" as a result of the declaration of martial law "constituted a serious infringement of the principles of Convention No. 87"). See *infra* text accompanying notes 58-60. As a result of Poland's inclusion in a special paragraph, the CACR's report was not adopted in Conference's plenary session. 68 Rec. Proc. 36/1 (1982). This was only the third time the Conference failed to adopt the CACR's report. See W. GALENSON, *supra* note 16, at 206; Landy, *supra* note 12, at 644 n.26.

36. ILO CONST. arts. 26-29. Complaints may ultimately be referred to the International Court of Justice. ILO CONST. arts. 29, 31-34. A similar type of adjudicatory procedure, a "representation," may be initiated by workers' or employers' organizations. ILO CONST. arts. 24-25. Representations are considered first by a three-member committee of the Governing Body and then by the Governing Body as a whole. See N. VALTICOS, *supra* note 12, at 248; Landy, *supra* note 12, at 640.

37. See 66 Off. Bull., Ser. B, Spec. Supp. (1983) (Commission of Inquiry report on Dominican Republic and Haiti); ILO Doc. GB.196/4/10 (1975) (Commission of Inquiry report on Chile); 54 Off. Bull., No. 2, Spec. Supp. (1971) (Commission of Inquiry report on Greece); 46 Off. Bull., Supp. II (1963) (Commission of Inquiry report on Liberia); 45 Off. Bull., Supp. II (1962) (Commission of Inquiry report on Portugal). See generally N. VALTICOS, *supra* note 12, at 245-47; Landy, *supra* note 12, at 649-51.

38. See 223 G.B. Min. V/6 (1983) (appointment of members of Commission of Inquiry). See also *id.* at IV/10 (preliminary decision to establish Commission of Inquiry). Until the

of the ILO to refuse to cooperate at all with a Commission of Inquiry³⁹ and even threatened to withdraw from the ILO in response to the Commission's establishment.⁴⁰

2. *Freedom of Association Machinery*

In addition to ordinary supervisory procedures which apply to any convention, the ILO encourages implementation of the freedom of association conventions through adjudicatory mechanisms unique to those instruments. The primary body responsible for receiving complaints is the tripartite Governing Body Committee on Freedom of Association ("CFA").⁴¹ Because of the importance of the principles of freedom of association to the ILO's Constitutional aims and purposes,⁴² governments and workers' and employers' organizations may present a complaint against a member state whether or not that state has ratified the freedom of association conventions.⁴³ The freedom of association machinery also includes a Fact-Finding and Conciliation Commission⁴⁴ composed of in-

Governing Body's action, the article 26 complaint had been considered in the Committee on Freedom of Association together with Case No. 1097 concerning Poland. *See infra* notes 61-63.

39. *See* 67 Off. Bull., Ser. B, Spec. Supp. 123 (1984) (Commission of Inquiry report on Poland). Member states are obliged to "place at the disposal of the Commission all the information in their possession which bears upon the subject-matter of the complaint." ILO CONST. art. 27.

40. *See supra* text accompanying note 2.

41. *See* 117 G.B. Min. 88 (1951) (establishing CFA procedures). *See generally* E. HAAS, *supra* note 31, at 383-423; E. HAAS, *HUMAN RIGHTS AND INTERNATIONAL ACTION* (1970); N. VALTICOS, *supra* note 12, at 249-50; Landy, *supra* note 12, at 654-55.

42. *See* ILO CONST. preamble para. 2 & annex art. I, para. b. *See generally* 57 Off. Bull. 152 (1974) (resolution on freedom of association and industrial relations in Europe).

43. *See* W. GALENSON, *supra* note 16, at 206; E. HAAS, *supra* note 31, at 381; N. VALTICOS, *supra* note 12, at 248; Landy, *supra* note 12, at 640, 653-54. Complaints are presented to the CFA primarily by trade union organizations. *See* N. VALTICOS, *supra* note 12, at 248; Landy, *supra* note 12, at 654. The CFA's reports are transmitted to the Governing Body, which ordinarily approves them. *See* N. VALTICOS, *supra* note 12, at 249. The Soviet Union and other bloc states have questioned the CFA's objectivity. *See, e.g.*, 139 G.B. Min. 27 (1958) (statement by USSR government delegate). *See also* S. IVANOV, *supra* note 23, at 230-36 (criticisms of composition and work of CFA); V. SHKUNAIEV, *supra* note 16, at 95 (CFA as instrument of cold war and political propaganda against socialist countries); V. VLADIMIROV, *supra* note 16, at 65, 89; Letter to Francis Blanchard, *supra* note 16 (declaration of socialist countries noting that "[r]epresentatives of socialist countries are not admitted to such important bodies of the so-called ILO supervisory machinery as, for example, the Governing Body Committee on Freedom of Association"). *Cf. supra* note 32 (bloc states question impartiality of COE). Partially as a result of the ILO's consideration of the Polish labor situation, the bloc states have recently renewed their efforts to modify the supervisory machinery. *See, e.g.*, 69 Rec. Proc. 7/17-7/19 (1983) (statement by government delegate from German Democratic Republic calling for working group to examine supervisory machinery); Letter to Francis Blanchard, *supra* note 16 (declaration of socialist countries arguing that "[t]here is a striking contrast between approaches towards representations and complaints lodged against socialist States and those concerning imperialist States"). *But cf.* S. IVANOV, *supra* note 23, at 218-20 (necessity for strengthening ordinary supervisory apparatus).

44. *See* E.S.C. Res. 277, 10 U.N. ESCOR Supp. (No. 1) at 9 (1950) (approving establishment of Fact-Finding and Conciliation Commission). *See generally* N. VALTICOS, *supra*

dependent experts to which complaints may be referred only with the consent of the government concerned. The Commission was originally intended to be the primary body in the freedom of association machinery. In actuality, however, few cases have been considered through this route. The CFA, which at first was intended as a body for conducting preliminary investigations, consequently has emerged as the principal organ in the freedom of association machinery for publicizing violations of trade union rights.⁴⁵

Cases in the CFA have demonstrated that Poland has persistently failed to observe the principles embodied in the freedom of association conventions. Poland has been the subject of four complaints lodged with the CFA, each of which has resulted in adverse findings.

The first complaint against Poland⁴⁶ was presented to the CFA in 1953.⁴⁷ The CFA examined Poland's trade union scheme⁴⁸ and noted that trade unions were required by the constitution and rules of the Central Council of Trade Unions to recognize the guiding role of the Polish United Workers' Party ("PUWP"), Poland's Communist Party. The CFA suggested that the registration requirement, the necessity for recognition of the guiding role of the PUWP by registered unions, and the imposition of trade union unity were inconsistent with the right of workers to establish and join organizations of their own choosing without previous authorization.⁴⁹ The second case⁵⁰ was commenced in 1956 as a result of a strike and demonstration in Poznan. After noting that strikes, although not illegal, were officially discouraged and disapproved in Poland, the CFA emphasized that the right to strike and the right to demonstrate peacefully in support of occupational demands were critical rights of workers and workers' organizations.⁵¹

In 1978 another complaint⁵² was presented to the CFA alleging that Poland's trade union legislation still did not meet the standards of No. 87. In mid-1980, however, the Polish government concluded historic agreements⁵³ with striking workers providing in part for the full imple-

note 12, at 250-52; Landy, *supra* note 12, at 656-57.

45. See E. HAAS, *supra* note 31, at 383; W. GALENSON, *supra* note 16, at 207; Landy, *supra* note 12, at 656. See generally A. ALCOCK, *supra* note 16, at 260-69 (establishment of freedom of association machinery by ILO in consultation with UN); S. IVANOV, *supra* note 23, at 222-30 (same).

46. CFA Case No. 58 (Poland).

47. Nos. 87 and 98 did not enter into force for Poland until February 25, 1958. 264 U.N.T.S. 332, 348. But see *supra* text accompanying note 43 (complaints against ILO member states may be presented to CFA regardless of ratification of Nos. 87 and 98).

48. See *supra* text accompanying note 33.

49. 39 Off. Bull. 191-93 (1956) (CFA Case No. 58).

50. CFA Case No. 148 (Poland).

51. 39 Off. Bull. 207-09 (1956) (CFA Case No. 148). See generally E. HAAS, *supra* note 31, at 386-87 (analyzing CFA Cases Nos. 58 and 148).

52. CFA Case No. 909 (Poland).

53. The first agreement, which included a provision specifying implementation of No. 87, was concluded in Szczecin on August 30, 1980. Glos Pracy, Sept. 2, 1980, at 2, col. 4;

mentation of Nos. 87 and 98. The government also agreed to alter the registration requirement and to guarantee the right to strike. In October the Polish parliament (*Sejm*) adopted an amendment⁵⁴ to the Trade Union Act of 1949 permitting registration with the Warsaw provincial court instead of the Central Council of Trade Unions. That court, however, modified the charter of the confederation of independent trade unions Solidarity (*Solidarnosc*) by inserting a reference to the leading role of the PUWP and altering the provisions dealing with strikes.⁵⁵ On appeal the Polish Supreme Court concluded that the lower court had exceeded its power in modifying Solidarity's charter. The Supreme Court then approved without alteration a version of the charter submitted by the union which included the principal provisions of Nos. 87 and 98 as an annex.⁵⁶ As a result of these developments, the CFA concluded in November 1980 that the complaint had "lost its basis."⁵⁷

Zycie Warszawy, Sept. 2, 1980, at 2, col. 1, translated in N. ASCHERSON, *supra* note 6, at 284; AUGUST 1980, *supra* note 8, at 416. The second, which provided in addition for implementation of No. 98, was concluded in Gdansk on August 31, 1980. Glos Pracy, Sept. 2, 1980, at 2, col. 1; Zycie Warszawy, Sept. 2, 1980, at 2, col. 1, translated in N. ASCHERSON, *supra* note 6, at 288; AUGUST 1980, *supra* note 8, at 423; KARATNYCKY, ET AL., *supra* note 8, at 123; D. MACSHANE, *supra* note 6, at 151 [hereinafter cited as Gdansk Agreement]. In the Gdansk Agreement the government consented to "the establishment of new, independent and self-governing trade unions" that would not be under the control of the state or the PUWP. The new unions "[r]ecogniz[ed] that the PUWP plays the leading role in the state" and stated further that they did not intend to be a political party, would observe the Polish constitution, would not attempt to disrupt Poland's international alliances, and approved of the principle of social ownership of the means of production. The Polish government subsequently extended the Gdansk Agreement to the entire country. See TOURAINE, ET AL., *supra* note 6, at 197; L. WESCHLER, *supra* note 6, at 176; de Weydenthal, *supra* note 5, at 12. A third agreement was concluded in Jastrzebie on September 3. See N. ASCHERSON, *supra* note 6, at 177.

54. 1980 Dziennik Ustaw 241 (Pol.), translated in 1980 ILO LEGIS. SER. 34 (Supp.). The government stated that the amendment was designed to allow registration of the new independent unions, as specified in the Gdansk Agreement, with a body other than the Central Council of Trade Unions. The government also communicated to the ILO that it was undertaking to draft new trade union legislation consistent with Poland's international obligations. See 63 Off. Bull., Ser. B, No. 3, at 101-04 (CFA Case No. 909).

55. See PRAWO I ZYCIE, Nov. 23, 1980, at 12 (report on hearing in Supreme Court describing actions taken by provincial court) (English summary and text of charter submitted by Solidarity to provincial court on file with *Denver Journal of International Law and Policy*).

56. See *id.* (reporting text of judgment) (translation on file with *Denver Journal of International Law and Policy*). The Supreme Court's decision is thought to represent a behind-the-scenes compromise between the government and Solidarity. See generally N. ASCHERSON, *supra* note 6, at 195-99; de Weydenthal, *supra* note 5, at 17-19; *Court Backs Union in Poland's Dispute over Role of Party*, N.Y. Times, Nov. 11, 1980, at A1, col. 5. The reference to the leading role of the PUWP was relegated to an annex quoting portions of the Gdansk Agreement. See de Weydenthal, *supra* note 5, at 18-19.

57. 63 Off. Bull., Ser. B, No. 3, at 108 (1980) (CFA Case No. 909). The COE's next report noted the statutory amendment "with satisfaction." 1981 COE Rep. 121. In connection with Case No. 909, Poland received the first "direct contact" mission ever accepted by a Soviet bloc state. See 63 Off. Bull., Ser. B, No. 3, at 98 (1980) (CFA Case No. 909); ILO Press Release (Nov. 27, 1981). See generally N. VALTICOS, *supra* note 12, at 242-43; Landy,

In December 1981 the Polish Council of State adopted a martial law decree and resolution⁵⁸ that curtailed all trade union activity and prohibited strikes. Two new complaints⁵⁹ were immediately presented to the CFA alleging that the arrest and detention of trade unionists and the prohibition of trade union activity as a result of the declaration of martial law violated Nos. 87 and 98, the 1980 agreements, and the charters of the independent unions. The CFA found that the internment of trade union activists and the suppression of trade union functions were inconsistent with the principles of freedom of association.⁶⁰ In October 1982 the *Sejm* adopted new trade union legislation⁶¹ that purported to guarantee the independence of self-governing trade unions. The CFA found numerous defects in the law, among which were the dissolution of all existing trade unions, restrictions on the right to strike, and a statutory timetable prohibiting resumption of trade union activity before specified dates.⁶² At the CFA's recommendation,⁶³ the Governing Body referred this case and the article 26 complaint filed by delegates to the 1982 Conference to a Commission of Inquiry.⁶⁴

In the conclusions to its report,⁶⁵ the Commission noted that the Po-

supra note 12, at 646-47. Lech Walesa, President of the National Committee of Solidarity, was the Polish workers' delegate to the 1981 Conference. *See* 67 Rec. Proc. 10/9-10/10 (1981), reprinted in D. MACSHANE, *supra* note 6, at 160 (Walesa's address to Conference).

58. 1981 Dziennik Ustaw 309, 317 (Pol.), translated in JPRS E. EUR. REP., Feb. 26, 1982, at 21. Martial law was suspended by the Council of State's resolution of December 19, 1982. 1982 Dziennik Ustaw 737 (Pol.) (translation on file with *Denver Journal of International Law and Policy*). *See also id.* at 730 (law on special legal regulations during the suspension of martial law) (translation on file with *Denver Journal of International Law and Policy*). The Council of State lifted martial law by its resolution of July 20, 1983. 1983 Dziennik Ustaw 536 (Pol.) (translation on file with *Denver Journal of International Law and Policy*).

59. CFA Case No. 1097 (Poland).

60. 65 Off. Bull., Ser. B, No. 1, at 186-87 (1982) (CFA Case No. 1097). The COE's next report contained similar observations. 1982 COE Rep. 125-26. Poland sent a delegation to the 1982 Conference consisting only of government representatives. Nongovernmental delegates must be "chosen in agreement with the industrial organisations, if such organisations exist, which are most representative of employers or workpeople, as the case may be, in their respective countries." ILO CONST. art. 3, para. 5. *See also id.* art. 3, para. 9 (Conference may exclude delegates not nominated in accordance with this principle). Because of this requirement, the Polish government probably anticipated a credentials challenge if a workers' delegate other than from Solidarity were part of the Polish delegation.

61. 1982 Dziennik Ustaw 581 (Pol.), translated in 1982 ILO LEGIS. SER. The Polish government submitted a draft of the legislation to the ILO for review three days before enactment. Although the government made some changes based on the ILO's comments, it did not alter the basic provisions of the legislation. *See* 65 Off. Bull., Ser. B, No. 3, at 288-89, 298-99 (1982) (CFA Case No. 1097).

62. 65 Off. Bull., Ser. B, No. 3, at 299-301 (1982) (CFA Case No. 1097). The COE's next report also noted inconsistencies between the new trade union legislation and Nos. 87 and 98. 1983 COE Rep. 147-48, 181.

63. 66 Off. Bull., Ser. B, No. 2, at 144 (1983) (CFA Case No. 1097).

64. *See supra* note 38. Poland boycotted the 1983, 1984, and 1985 Conferences.

65. 67 Off. Bull., Ser. B, Spec. Supp. 120-46 (1984) (Commission of Inquiry report on Poland).

lish government had not appeared before it and had totally failed to cooperate with the Commission's investigation. In particular, the government had refused to permit members of the Commission to visit Poland to communicate firsthand with those involved in the controversy and did not allow witnesses in Poland to leave the country to testify before the Commission in Geneva. The Commission nonetheless concluded that, because of Poland's voluntary ratification of the ILO's Constitution and the freedom of association conventions, the Commission's examination of the complaint did not constitute interference in Poland's internal affairs. The Commission also rejected the assertion that the complaint's allegedly political character affected its validity.⁶⁶

On the merits of the complaint, the Commission concluded that the situation in Poland before the declaration of martial law was not so grave as to justify subsequent nonobservance of the freedom of association conventions. The suspension of trade union activity by the declaration of martial law and the subsequent dissolution of all existing trade unions by the new trade union legislation consequently were violations of No. 87. The Commission found that the prohibition on strikes and the internment and detention of trade union leaders because of their trade union activities likewise conflicted with the guarantees of No. 87. The Commission also considered the evidence to demonstrate that after the declaration of martial law many members of independent unions suffered antiunion discrimination in violation of No. 98.

After reviewing Poland's new trade union legislation, the Commission found that a transitional prohibition on more than one trade union organization in an enterprise conflicted with No. 87, which anticipates trade union plurality. The Commission observed that a requirement for approval of a strike by a majority of a union's members, as distinct from a majority of its voting members, was an unreasonable restriction on the right of trade unions to organize their activities. Restrictions on the establishment of federations and confederations were also criticized by the Commission as violations of No. 87.⁶⁷

66. See *supra* text accompanying note 2.

67. The Commission also noted that a requirement in the legislation that trade unions be organized by occupation was acceptable to the extent that those unions could form regional associations. See 67 Off. Bull., Ser. B, Spec. Supp. 142 (1984) (Commission of Inquiry report on Poland). See also *id.* at 143-44 (right to establish federations and confederations guaranteed by No. 87 must be applied to permit regional associations). This had been a particularly troublesome issue for the government because Solidarity, unlike the official trade unions, had adopted a regional structure. The government often asserted that this was evidence of Solidarity's intent to become not a trade union, but a political organization. See, e.g., 65 Off. Bull., Ser. B, No. 2, at 155-56, 174 (1982) (CFA Case No. 1097); N. ASCHERSON, *supra* note 6, at 178-79. Cf. S. IVANOV, *supra* note 23, at 29-31 (interpreting No. 87 as protecting political activity by trade unions). Interestingly, the Commission of Inquiry found that a provision in the new trade union legislation requiring reference in a trade union's charter to the leading role of the PUWP in society was not of itself a violation of No. 87. See 67 Off. Bull., Ser. B, Spec. Supp. 142-43 (1984) (Commission of Inquiry report on Poland). Cf. 1985 COE Rep. 182-83 (criticism of statutory timetable for resumption of trade

IV. Conclusion

In its recommendations,⁶⁸ the Commission of Inquiry stated its belief that freedom of association could exist in Poland without disruption of fundamental principles on which the Polish state is based. Before the declaration of martial law, the Polish government had produced draft trade union legislation that the ILO approved as basically consistent with the freedom of association conventions.⁶⁹ Even after the declaration of martial law, the Polish government admitted that there was room in its socioeconomic system for self-managed and truly independent unions.⁷⁰ This assertion is not contrary to Lenin's statements on trade unions. Even more importantly, this attitude on the part of the government is required by the universal principles of trade union freedom to which Poland has voluntarily adhered. Instead of withdrawing from the ILO, the Polish government might more profitably invest its effort in working with the Organization once again to begin to establish a trade union environment consistent with fundamental principles of freedom of association.⁷¹

union activity and conditions on right to strike).

68. 67 Off. Bull., Ser. B, Spec. Supp. 148 (1984) (Commission of Inquiry report on Poland).

69. See 64 Off. Bull., Ser. B, No. 2, at 3 (1981) (CFA Case No. 909).

70. See 65 Off. Bull., Ser. B, No. 1, at 181 (1982) (CFA Case No. 1097).

71. Even if Poland withdraws from the ILO, it will still be bound by the obligations assumed under Nos. 87 and 98. See *supra* note 1. In cases of persistent inability to observe a convention, denunciation is a potential last resort. See E. LANDY, *supra* note 30, at 97 (Denunciation "is a solution of despair[,] . . . [y]et it may be precisely in the interest of the rule of law to put an end to obligations when efforts to observe them encounter fundamental obstacles and when there apparently exists no hope for gradual compliance."); Landy, *supra* note 12, at 648. Cf. Note, *The Polish Labor Crisis of 1980: An Assessment of the Role of the International Labor Organization*, 8 BROOKLYN J. INT'L L. 177, 203 & n.163 (1982) (suggesting that implementation of freedom of association conventions in Poland could be facilitated by ratification of Convention No. 144 Concerning Tripartite Consultations to Promote the Implementation of International Labour Standards).